Filed 1/31/14 P. v. Munoz CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CODY MUNOZ, Defendant and Appellant.	A135661 (Contra Costa County Super. Ct. No. 05-111577-3)

Defendant Cody Munoz was convicted by jury of robbery, receiving stolen property and petty theft. On appeal, he contends (1) the jury instructions permitted the jury to convict him of robbery without proof beyond a reasonable doubt of all elements of the offense, (2) the evidence was insufficient to support the petty theft conviction, and (3) he could not be convicted of both robbery and receiving the property stolen in the robbery. The Attorney General concedes the receiving stolen property conviction must be reversed. We reverse that conviction, but we reject Munoz's other arguments and, therefore, affirm the judgment in all other respects.

I. BACKGROUND

On March 22, 2011, Gurbinder Sokhi was working in his liquor store, Vintage Wine and Liquor, on Clayton Road in Concord. At approximately 10:30 or 10:40 p.m., Munoz and D.W., a minor, entered the store. D.W. walked to the liquor section of the store, and Munoz walked to the beer section. Both D.W. and Munoz appeared to be under 21 years of age.

Sokhi saw D.W. pick up a bottle of Bailey's liquor and hide it under his jacket. Sokhi yelled, " 'Put that back.' " D.W. put the bottle back, but picked up a bottle of Grand Marnier. Sokhi asked D.W. to put the bottle back four or five times, but D.W. put it under his jacket and walked to the front of the store. Sokhi blocked the store exit to prevent D.W. from leaving. As D.W. approached the exit, Sokhi tried to grab the bottle. D.W. called to Munoz to help him.

Munoz joined D.W., and together they pushed Sokhi out of the store. Once outside, Munoz and D.W. hit Sokhi on the head and kicked his legs. Munoz hit Sokhi more than six or seven times. Either Munoz or D.W. hit Sokhi on the head with the bottle of Grand Marnier. At some point, the bottle fell to the ground, and Munoz and D.W. picked it up and fled.

Later that night (at approximately 12:00 a.m. on March 23, 2011), Concord Police Officer Scott Gillespie was notified that two males were breaking into cars near the intersection of Walnut and Farm Bureau Road in Concord, about a mile from the Vintage Wine and Liquor store. When he arrived in the area, Gillespie saw Munoz and D.W. sitting inside a gold Mercedes Benz 300 parked in front of Leroy Gerke's residence on Farm Bureau Road. The car doors were open. Munoz was in the driver's seat, and D.W. was in the passenger's seat. Gillespie stopped his police car 10 to 15 feet behind the Mercedes and approached it on foot.

When Gillespie shone a light on the Mercedes, Munoz got out of the car. He was holding a bottle of Grand Marnier that was three-fourths full. D.W. jumped into bushes on the passenger side of the car. After detaining Munoz, Gillespie searched Munoz and found a socket wrench, wire cutters, and a screwdriver in his pockets. Based on his knowledge and experience, Gillespie believed those items could be used to break into or steal cars—a screwdriver can be inserted into the ignition to start a car, wire cutters can be used to "hot wire[]" older cars, and a heavy object like a socket wrench can be used to break car windows.

Gillespie searched the area where D.W. had attempted to hide, which was about five feet from the Mercedes. Gillespie found a large silver purse, a red flashlight, a blue knife, and a cell phone.

Gerke told Gillespie the purse and flashlight had been inside his Honda Odyssey minivan, which was parked in his driveway.[1] Gerke was not diligent about locking the minivan and did not lock the Mercedes. Gillespie did not believe Munoz or D.W. used the tools found on Munoz to enter the minivan.

Munoz was charged by information with (1) second degree robbery of Sokhi (Pen. Code,[2] §§ 211, 212.5, subd. (c), count one); (2) second degree vehicle burglary (§§ 459, 460, subd. (b), count two); (3) receiving stolen property (the bottle of Grand Marnier) (§ 496, subd. (a), count three); and (4) petty theft from Gerke (§§ 484, 488, count four). The court later dismissed count two.

The jury found Munoz guilty on counts one, three, and four. The court suspended execution of sentence as to count one and placed Munoz on probation, with the condition he serve 365 days in jail; the court imposed concurrent jail terms for counts three and four.

Munoz appealed.

II. DISCUSSION

A. The Jury Instructions

1. Background

The court instructed the jury on the elements of robbery and the requirements for conviction on an aiding and abetting theory. The court, using CALCRIM No. 376, instructed the jury about the significance of a defendant's knowing possession of recently stolen property: "If you conclude that a defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of robbery based on those facts alone. However, if you also find that

[1] At trial, Gerke testified he had not seen the purse before because his wife had just bought it.

[2] All statutory references are to the Penal Code unless otherwise stated.

supporting evidence tends to prove his or her guilt, then you may conclude that the evidence is sufficient to prove he committed robbery. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his or her guilt of robbery. [¶] *Remember that you may not convict a defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt*." (Italics added.)

The trial court instructed the jury about the prosecution's burden of proof, using CALCRIM No. 220, which states in part: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] . . . [¶] Unless the evidence proves a defendant guilty beyond a reasonable doubt, he or she is entitled to an acquittal and you must find the defendant not guilty."

2. Analysis

Munoz argues the jury instructions, especially CALCRIM No. 376, allowed the jury to convict him of robbery without finding the prosecution proved the elements of the offense beyond a reasonable doubt. We disagree.

"We review de novo whether a jury instruction correctly states the law. [Citation.] Our task is to determine whether the trial court ' "fully and fairly instructed on the applicable law." [Citation.]' [Citation.] [¶] ' "When reviewing a supposedly ambiguous [i.e., potentially misleading] jury instruction, ' "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." ' " [Citation.]' [Citation.]" (*People v. Lopez* (2011) 198 Cal.App.4th 698, 708.)

As noted, CALCRIM No. 376 informs jurors they may not convict a defendant of robbery based solely on a defendant's knowing possession of recently stolen property. But if "supporting evidence," which may be "slight," also tends to prove the defendant's

guilt, the jury "may" conclude the evidence is sufficient to prove the defendant committed robbery. (CALCRIM No. 376.)

Courts have consistently held CALCRIM No. 376 and its predecessor, CALJIC No. 2.15, do not lower the prosecution's burden of proof. (E.g., *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 189 ["there was no suggestion in [CALJIC No. 2.15] that the jury need not find that all of the elements of robbery (or theft) had been proved beyond a reasonable doubt"]; *People v. Gamache* (2010) 48 Cal.4th 347, 376 [CALJIC No. 2.15 does not lower prosecution's burden of establishing guilt beyond a reasonable doubt]; *People v. Lopez, supra,* 198 Cal.App.4th at p. 711 [CALCRIM No. 376 does not lower burden of proof]; *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1576–1577 [same].) As courts have noted, the instruction is "generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime." (*People v. Gamache, supra,* at p. 375 [CALJIC No. 2.15]; see *People v. Lopez, supra,* at p. 710 [CALCRIM No. 376].) While the instruction permits the jury to infer guilt when there is supporting evidence, this inference is permissive, not mandatory. (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1226 [CALJIC No. 2.15].) "Because a jury may accept or reject a permissive inference 'based on its evaluation of the evidence, [it] therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt.' [Citation.] Requiring only 'slight' corroborative evidence in support of a permissive inference, such as that created by possession of stolen property, does not change the prosecution's burden of proving every element of the offense, or otherwise violate the accuser's right to due process unless the conclusion suggested is not one that reason or common sense could justify in light of the proven facts before the jury." (*People v. Snyder, supra,* at p. 1226; accord, *People v. Williams* (2000) 79 Cal.App.4th 1157, 1173 ["As long as the corroborating evidence together with the conscious possession [of recently stolen property] could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process."].)

Despite the above case law, Munoz argues the instructions in this case permitted the jury to convict him without finding the prosecution proved the elements of robbery beyond a reasonable doubt. Munoz notes the trial court's general burden-of-proof instruction, CALCRIM No. 220, states "the People [must] prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise." Munoz then asserts the court, by using CALCRIM No. 376, "told the jury otherwise," i.e., the court stated an exception to the prosecution's burden of proof beyond a reasonable doubt. We disagree. First, for the reasons discussed above, the permissive inference authorized by CALCRIM No. 376 (based on knowing possession of recently stolen property and slight supporting evidence) does not alter, or state an exception to, the prosecution's burden of proof. Second, CALCRIM No. 376 itself expressly *confirms* the burden of proof, emphasizing jurors may not convict a defendant of any crime unless they are "convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." (CALCRIM No. 376.)

Munoz argues that, because this portion of the instruction states the jury must find proof of each "fact" essential to guilt (instead of referring to each "element" of the offense), the jury could convict based only on proof of certain "facts" specified in CALCRIM No. 376, without finding proof of all elements of robbery. We do not find it reasonably likely the jury applied the court's instructions in a manner that allowed conviction without proof of all elements of the crime beyond a reasonable doubt. (See *People v. Lopez, supra,* 198 Cal.App.4th at p. 708.) The court instructed the jury as to the elements of robbery. The court also emphasized the burden of proof in its general instructions and in CALCRIM No. 376, as well as in other instructions. It is not reasonably likely the jury ignored the instructions on the elements of robbery and the burden of proof and construed CALCRIM No. 376 (requiring proof of each "fact" essential to guilt of robbery) to permit conviction without proof of the elements of robbery specified by the court. (We note the court's instruction on the elements of robbery immediately followed its reading of CALCRIM No. 376.)

Finally, Munoz suggests the court's aiding and abetting instructions, in conjunction with CALCRIM No. 376, could have caused jurors to be confused as to whether they had to find the elements of robbery had been proved beyond a reasonable doubt. We disagree. The court, using CALCRIM No. 401, instructed the jury as to the elements of aiding and abetting liability.[3] As part of this instruction, the court stated: "If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor." This instruction favored Munoz by emphasizing that his presence at the scene of the robbery, while relevant, was not sufficient to establish he was an aider and abettor. The instruction did not state or suggest jurors should disregard the court's instructions that they could only convict Munoz of robbery upon proof beyond a reasonable doubt that he committed, or aided and abetted the commission of, robbery. It is not reasonably likely the jury applied CALCRIM No. 401 (either alone or in conjunction with CALCRIM No. 376) in a way that nullified the court's instructions requiring such proof.

B. Sufficiency of the Evidence of Petty Theft (Count Four)

Munoz contends there is insufficient evidence to support his conviction of petty theft of property from Leroy Gerke. To determine whether the prosecution met its burden to prove a charge beyond a reasonable doubt, we apply the "substantial evidence" test. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) Under that standard, we " 'must review the whole record in the light most favorable to the judgment below to determine

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[3] "CALCRIM No. 401 sets forth the four elements for aiding and abetting liability: [¶] 'To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] '1. The perpetrator committed the crime; [¶] '2. The defendant knew that the perpetrator intended to commit the crime; [¶] '3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] '4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.' " (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103.)

whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*Id.* at pp. 260–261, original italics.) " 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We ' " 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

A person commits theft if he takes possession of property without the owner's consent, with the intent to deprive the owner of it permanently, and moves the property, even a small distance. (See *People v. Davis* (1998) 19 Cal.4th 301, 305; CALCRIM No. 1800.) Evidence a defendant aided and abetted a theft also will support a conviction of theft. (See *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1027.)

Applying the above standards, we conclude there is substantial evidence supporting Munoz's conviction of petty theft. Officer Gillespie testified that, after Munoz was arrested, he stated he and D.W. had decided to walk up Farm Bureau Road to check whether parked cars were locked, and to take money or property that could be sold for money. When Gillespie arrived at Gerke's house, he saw Munoz and D.W. sitting in Gerke's Mercedes in front of the house. As Gillespie approached, D.W., who was sitting in the passenger seat, jumped out of the car and into some bushes. Gillespie found in the bushes a silver purse and a red flashlight. Gillespie testified Gerke told him the purse and flashlight belonged to Gerke and had been inside Gerke's Honda Odyssey minivan, which was parked in his driveway.

Based on this evidence, the jury reasonably could have inferred that, while Munoz and D.W. were checking parked cars for items to steal, they entered Gerke's minivan and took the purse and flashlight. The jury could have inferred Munoz and D.W. took the items into the Mercedes, and D.W. then took them when he jumped into the bushes.

Munoz argues the evidence does not support a logical inference that he took possession of, or moved, Gerke's property. We disagree. The jury reasonably could have concluded Munoz and D.W. were working in concert, based on the evidence they

were checking parked cars together for items to steal (and bolstered by the evidence they robbed Sokhi together earlier in the evening). Moreover, as noted, the testimony the purse and flashlight were found in the bushes where D.W. attempted to hide allowed an inference the items were in the Mercedes with Munoz and D.W. before D.W. jumped out. The jury, therefore, reasonably could have concluded Munoz and D.W. took the items from the minivan and moved them. Although the evidence does not establish with certainty which individual physically carried the items out of the minivan, the jury reasonably could have concluded Munoz either took the items himself or aided and abetted D.W. in the theft of the items.

Munoz also contends there is no evidence he knew that the items existed or that anyone stole them. Again, we disagree. Because Munoz and D.W. were checking parked cars together for items to steal, and because the evidence allows an inference the items were in the Mercedes before D.W. jumped out, the jury reasonably could infer Munoz knew the items existed and were stolen.

After reviewing the record in the light most favorable to the judgment, we conclude there is substantial evidence such that a jury reasonably could find Munoz guilty of petty theft beyond a reasonable doubt. (See *People v. Clark, supra,* 52 Cal.4th at p. 943.)

C. The Receiving Stolen Property Conviction (Count Three)

The Attorney General concedes Munoz should not have been convicted of both robbery and receiving the property stolen in the robbery (the Grand Marnier). (See § 496, subd. (a); *People v. Stephens* (1990) 218 Cal.App.3d 575, 586–587.) We will reverse the conviction for receiving stolen property. (See *People v. Ceja* (2010) 49 Cal.4th 1, 10; *People v. Stephens, supra,* at p. 587.)

III. DISPOSITION

The receiving stolen property conviction (count three) is reversed. In all other respects, the judgment is affirmed.

_____
Becton, J.*

We concur:

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Margulies, Acting P.J.

_____
Banke, J.

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.